NO. 88-1195

Supreme Court, U.S.
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JAN 19 1989
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

JOSEPH THADDEUS SERE,

PETITIONER,

v.

HQ, DEFENSE COMMUNICATIONS AGENCY(DOD),

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSEPH THADDEUS SERE
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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fourth Circuit erred in giving deciding authority precedence to the less relevant Title VII instead of to the more relevant and governing Federal law, The Civil Service Reform Act of 1978, and erred in overlooking other material laws and material facts regarding prima facie discriminatory preferential treatment of eight less-qualified, non-RIF'ed Civil Service females over protected, more qualified, and RIF'ed Civil Service male petitioner.

TABLE OF CONTENTS

QUESTION PRESENTED..... 1

TABLE OF AUTHORITIES..... v

OPINION BELOW..... 2

JURISDICTION..... 2

STATUTES AND REGULATIONS INVOLVED IN THIS CASE..... 3

STATEMENT OF THE CASE..... 8

A.BACKGROUND OF THE CASE..... 8

B.CAUSE OF ACTION..... 9

C.ENSUING LITIGATION..... 10

REASON FOR GRANTING THE WRIT:

I.THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN GIVING DECIDING AUTHORITY PRECEDENCE TO THE LESS RELEVANT AND LESS RECENT TITLE VII INSTEAD OF TO THE MORE RELEVANT,RECENT, AND GOVERNING FEDERAL LAW,THE CIVIL SERVICE REFORM ACT OF 1978 REGARDING

PRIMA FACIE DISCRIMINATORY PREFERENTIAL TREATMENT OF EIGHT LESS-QUALIFIED,NON-RIF'ed CIVIL SERVICE FEMALES OVER PROTECTED,MORE QUALIFIED,AND RIF'ed CIVIL SERVICE MALE PETITIONER..... 12

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN OVER-LOOKING OTHER MATERIAL LAWS BESIDES THE CIVIL SERVICE REFORM ACT OF 1978 REGARDING PRIMA FACIE DISCRIMINATORY PREFERENTIAL TREATMENT FOR EIGHT LESS-QUALIFIED, NON-RIF'ed CIVIL SERVICE FEMALES OVER PROTECTED,MORE QUALIFIED,AND RIF'ed CIVIL SERVICE MALE PETITIONER.....16

III. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN OVER-LOOKING MATERIAL FACTS REGARDING PRIMA FACIE DISCRIMINATORY PREFERENTIAL TREATMENT OF EIGHT LESS-QUALIFIED,NON RIF'ed

CIVIL SERVICE FEMALES OVER PROTECTED, MORE QUALIFIED, AND RIF'ed CIVIL SERVICE MALE PETITIONER.....20

CONCLUSION..... 23

APPENDIX A -

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX B -

DENIAL OF PETITION FOR REHEARING BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TABLE OF AUTHORITIES

CASES

JOHNSON v.TRANSPORTATION AGENCY,
SANTA CLARA COUNTY.....6,8,18

TEXAS DEPARTMENT OF COMMUNITY
AFFAIRS v.BURDINE,U.S. 248.....6,10,16

McDONNELL DOUGLAS CORP. v.
GREEN,411,U.S.792.....5,16

FURNCO CONSTRUCTION CORP.
v.WATERS,438,U.S. 567,577.....5,17

STATUTES

CIVIL SERVICE REFORM ACT OF 1978...3,8,12

TITLE VII.....7,13

REGULATIONS

DEPARTMENT OF DEFENSE REGULATION
1400.20-1-M.....3,18

OPM FEDERAL PERSONNEL MANUAL
335-23.....4,19

OPM FEDERAL PERSONNEL MANUAL
335-5.....4,19

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH THADDEUS SERE,

PETITIONER,

v.

HQ,DEFENSE COMMUNICATIONS AGENCY(DOD),

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner,Joseph Thaddeus Sere, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on September 23,1988, Rehearing denied October 21,1988,mandate issued October 31,1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit was not published. An Order without written findings of fact was rendered by the U.S. District Court for the Eastern District of Virginia, Alexandria Division.

JURISDICTION

The Petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its opinion disregarding The Civil Service Reform Act of 1978's ban on prima facie discriminatory preferential treatment of Civil Service females over protected Civil Service male Petitioner and making the less recent and less relevant Title VII the governing decision authority.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

I)Civil Service Reform Act of 1978:

Chapter 23,Section 2302,Prohibited Personnel Practices:

"(6) grant any preference or advantage not authorized by law,rule,or regulation to any employee or applicant for employment(including defining the scope or manner of competition or the requirements for any position)for the purpose of improving or injuring the prospects of any particular individual;"

II)Department of Defense Regulation 1400.20-1-M:

"before making selections under competitive promotion procedures,each DoD activity will provide special consideration to its current(priority placement) employees...if the employee is interested and qualified,special consideration must

be extended to positions at or below the grade from which demoted..."

III)Office of Personnel Management(OPM) Federal Personnel Manual 335-23:

"(2)Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted.Although he is not guaranteed repromotion,ordinarily he should be repromoted when a vacancy occurs in a position at his former grade(or any intervening grade)for which he has demonstrated that he is well-qualified,unless there are persuasive reasons for not doing so.If a selecting official...decides not to select him for promotion...,the official must state his reasons for the record..."

IV)Office of Personnel Management(OPM) Federal Personnel Manual335-5:

"(e) A temporary promotion may not be used for the purpose of training or evaluating

an employee in a higher grade position."
" (2) A temporary promotion... may not be used,for example,to give an employee a trial period before permanent promotion, to decide among candidates for permanent promotion,or to train an employee in higher-grade duties."

V) McDonnell Douglas Corp. v.Green,411 U.S. 792:

Provides that circumstantial evidence of discriminatory preferential treatment motive is sufficient proof that a plaintiff is the victim of intentional discrimination.

VI)Furnco Construction Corp.v.Waters,438 U.S. 567,577:

Provides that a prima facie case of discriminatory preferential treatment exists where there is a pattern and frequency not otherwise explainable and therefore more likely than not due to inten-

tional consideration of impermissible factors such as sex.

VII)Texas Department of Community Affairs v. Burdine,450 U.S.248:

(verbal finding of facts in District Court Order dismissing petitioner's action on January 7,1987).

VIII)Johnson v. Transportation Agency,Santa Clara County:

Dissenting opinion of Justice Antonin Scalia,joined by Chief Justice William H. Rehnquist and joined in part by Justice Byron R.White:

"The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII...in many contexts,it effectively requires employers,public as well as private,to engage in intentional discrimination on the basis of race or sex..after today's decision,the failure to engage in re-

verse discrimination is economic folly.. a statute designed to establish a color blind and gender-blindworkplace has thus been converted into a powerful engine of racism and sexism,not merely permitting intentional race and sex-based discrimination but often making it,through operation of the legal system,practically compelled.The only losers in the process are the Johnsons of this country for whom Title VII has been not merely repealed but rather inverted."

Concurring opinion but separate view by Justice Sandra Day O'Connor:

" the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers...."

IX) Title VII

(statute used by Fourth Circuit).

STATEMENT OF THE CASE

A.Background of the Case.

I am one of the Johnsons of this land, as Justice Scalia put it in Johnson v. Transportation Agency,Santa Clara County, unknown,unaffluent,unorganized,whose Civil Service advancement and family livelihood have suffered because,for us,Title VII has not been merely repealed but actually inverted.My career has been stunted permanently by overzealous and unjustified steamrolling of my Civil Service Reform Act of 1978 rights by overzealous affirmative action powered by the engine of Title VII which is roaring even more loudly now as a result of Johnson v.Transportation Agency,Santa Clara County.

The reason why you never seem to hear from us Johnsons is monetary in-

ability to pay what lawyers are asking. The lawyer to whom I was referred by the Lawyer Referral Bureau in Alexandria before I opened suit in U.S.District Court asked $30,000 from start to finish. Just because I am not wealthy does not mean that I am going to fall down and drop this, so I apologize but I must proceed pro se and give you this burden because the only place left where I have a chance to find any justice is the Supreme Court .

B. Cause of Action.

I have been the victim of prima facie, continuous discriminatory preferential treatment of Civil Service females in high grade GS-13-14 promotions at HQ, Defense Communications Agency for years, even though I belong to a male group protected from such treatment. I was RIF'ed by DCA in October 1979 in an all-male

Reduction-in-Force of 5 employees with the other 1200 civilians insulated from the RIF.I was downgraded from GS-13 to GS-11 and could not "bump" any GS-13's in the insulated group.I applied in writing or verbally for the special re-promotion rights I have under RIF regulations on eight occasions but was passed over for GS-13 by DCA in favor of eight less-qualified and never-Rif'ed women.

C. Ensuing Litigation.

Petitioner filed suit regarding preferential treatment in U.S.District Court For the Eastern District of Virginia,Alexandria Division on May 18,1986.On Jan. 7, 1987,the District Court ordered my action dismissed from the bench citing as authority Texas Department of Community Affairs v. Burdine,450 U.S.1981.Order was not confirmed by written findings of fact.

Petitioner appealed the District Court dismissal to the United States Court of Appeals for the Fourth Circuit on Jan.7, 1987. The Fourth Circuit then denied me oral argument and affirmed the District Court on September 23,1988.A copy of this unpublished judgment is attached hereto as Appendix A.

The Appellant herein petitioned the Fourth Circuit for a Rehearing of his case on September 29,1988,with the Petition To The Chief Judge of the Fourth Circuit being denied at the direction of Judge Murnaghan on October 21,1988.A copy of the denial of the Petition To The Chief Judge for Rehearing is attached hereto as Appendix B.

REASON FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN GIVING DECIDING AUTHORITY PRECEDENCE TO THE LESS RELEVANT AND LESS RECENT TITLE VII INSTEAD OF TO THE MORE RELEVANT,RECENT,AND GOVERNING FEDERAL LAW,THE CIVIL SERVICE REFORM ACT OF 1978 REGARDING PRIMA FACIE DISCRIMINATORY PREFERENTIAL TREATMENT OF EIGHT LESS-QUALIFIED,NON-RIF'ed CIVIL SERVICE FEMALES OVER PROTECTED,MORE QUALIFIED,AND RIF'ed CIVIL SERVICE MALE PETITIONER.

Preferential treatment in the Civil Service is a prohibited personnel practice under The Civil Service Reform Act of 1978, Chapter 23,Section 2302.It is illegal for any DCA managers to: " (6) grant any preference or advantage not authorized by law,rule, or regulation to any employee or applicant

for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular individual;"

The Civil Service Reform Act of 1978 is more relevant to petitioner than Title VII because it was specifically enacted by Congress to protect Civil Service employees in contrast to the broader population covered by Title VII. It is also more recent and current than Title VII.

Title VII is much vaguer regarding preferential treatment in the Civil Service. Therefore, the Civil Service Reform Act of 1978 by reason of greater relevance, specificity, and recency should have been utilized by the Fourth Circuit as the governing authority instead of Title VII.

Petitioner established a prima facie case to the Fourth Circuit that he is a protected

member of a protected group by virtue of his male sex.The Fourth Circuit's limited affirmation that the District Court "did not clearly err" is an injustice to petitioner who entered Civil Service believing both Federal law and the traditional value of American fair play that every male will be treated equally,no better,no worse than every female for better-paying positions.

I applied in writing or verbally for special repromotion consideration under my RIF rights on eight occasions and received only token,meaningless attention, not serious consideration.In all eight instances,the high grades were given to less-qualified,non-RIF'ed females without any RIF or priority placement rights.

By disregarding the Civil Service Reform Act in petitioner's case,the Fourth Cir-

cuit has followed an expansive,ill-defined Title VII approach to preferential treatment and affirmative action at my expense.This approach only hardens Agency managers' determination to play favorites. The Fourth Circuit is only fueling a run-away train powered by Title VII.This run-away train of preferential treatment and misguided affirmative action to move Civil Service women ahead of me has compacted my experience,my education,my potential, and my RIF rights along the way.The brake, the Civil Service Reform Act of 1978,is in place,but the Fourth Circuit chooses not to step on the brake but rather to open the throttle of this Title VII engine to its breaking point and to make the engine roar even more loudly and the train run more out of control as it destroys the Civil Service careers of the Johnsons like myself.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN OVER-LOOKING OTHER MATERIAL LAWS BESIDES THE CIVIL SERVICE REFORM ACT OF 1978 REGARDING PRIMA FACIE DISCRIMINATORY PREFERENTIAL TREATMENT FOR EIGHT LESS-QUALIFIED, NON-RIF'ed CIVIL SERVICE FEMALES OVER PROTECTED, MORE QUALIFIED, AND RIF'ed CIVIL SERVICE MALE PETITIONER.

The Fourth Circuit failed to address or affirm specifically the District Court verbal finding of fact based on Texas Department of Community Affairs v.Burdine, 450 U.S. Nowhere does Burdine countenance discriminatory preferential treatment of females over males protected by Federal law.

McDonnell Douglas Corp. v.Green 411 U.S.792 allows circumstantial evidence of discriminatory preferential treatment motive to act as sufficient proof that

petitioner is a victim of intentional discrimination. I met this burden by providing a preponderance of circumstantial evidence and occurrences in which my RIF repromotion rights and qualifications were swept aside to line up the eight high grades for eight non-RIF'ed,less-qualified women.

Furnco Construction Corp. v.Waters,438 U.S. 567,577 provides that a prima facie case of discriminatory preferential treatment exists where there is a pattern and frequency not otherwise explainable and therefore more likely than not due to intentional consideration of impermissible factors such as sex.All eight females began at low grade GS-11 or GS-12 and were promoted to high grade GS-13 despite my greater management analyst experience,my RIF rights,and my fully successful performance appraisals.

Johnson v.Transportation Agency,Santa Clara County(dissenting opinion) affirms that the most significant proposition of law established by the Johnson decision is that sexual or racial discrimination is permitted under Title VII and that,in many contexts,it requires public and private employers to engage in intentional discrimination based on sex or race. Instead of establishing a gender-blind and color-blind workplace,Title VII has been converted into a powerful engine of sexism and racism...

Department of Defense Regulation 1400. 20-1-M mandates special(not meaningless lip service)repromotion consideration for RIF'ed male petitioner who was demoted from GS-13 to GS-11 through no fault of his own.This special repromotion consideration is mandated to take place before any competitive selection at all takes place,

yet eight women were pre-selected before I received even lip service(much less serious) repromotion consideration.

Office of Personnel Management(OPM) Federal Personnel Manual 335-23 mandates that RIF'ed petitioner ordinarily should be repromoted when vacancies occur in positions at his former grade or intervening grade for which he has demonstrated by performance that he is well-qualified unless there are persuasive reasons.

Office of Personnel Management(OPM) Federal Personnel Manual 335-5 and 335-24 prohibits temporary promotions for women for the purpose of training them or evaluating them for higher grade positions. Temporary promotions are prohibited for the purpose of giving women trial periods before permanent promotion.

Fourth Circuit overlooked testimony

and admission on witness stand by overall Comptroller,Robert Helms,that after 30 years in the Merit System that he believed that temporary promotions are intended as a benefit for women to prepare them for permanent promotion.He was over all eight women for whom I was passed over.

III- THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN OVERLOOKING MATERIAL FACTS REGARDING PRIMA FACIE DISCRIMINATORY PREFERENTIAL TREATMENT OF EIGHT LESS-QUALIFIED,NON-RIF'ed CIVIL SERVICE FEMALES OVER PROTECTED, MORE QUALIFIED,AND RIF'ed CIVIL SERVICE MALE PETITIONER.

Material Fact: The Fourth Circuit overlooked eight documented instances of DCA discriminatory preferential treatment in behalf of Ms. Dasher,Hartenstein, Fergusson,Vaughan,Coleman,Sage,White,and

Ivone.Despite fully and highly successful performance appraisals,petitioner since 1979 never once was given a chance at a Temporary promotion like the women above.

Material Fact: The Fourth Circuit sees no difference between the special consideration for repromotion mandated by DOD and OPM and lip service without any written rationale in the eight instances above.

Material Fact: Temporary promotions were usedas trial periods to prepare most of the eight women for permanent high grade promotions.

Material Fact: Petitioner was blacklisted by outgoing supervisor,Major Ragosta,to incoming supervisor,Michael Slawson,central player in most of the eight preferential treatments. Petitioner submitted memo in Mr.Slawson's admitted handwriting in which I am labelled as a "pain" before I ever met

Mr.Slawson.I was already prejudged before he met me.

Material Fact : The Fourth Circuit overlooked witness testimony by Lester Gross responding to District Court question as to whether my former secretary,Ms.White, received high grade temporary promotion in my place because she was a female and I was a male. Mr.Gross responded that she received the temporary promotion because she was a female,for her known activism in the Federal Women's Program.

CONCLUSION

For the reasons set forth hereinabove, Petitioner requests that the Writ of Certiorari be granted.

Respectfully submitted,

Joseph Thaddeus Sere

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PRO SE

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1023

JOSEPH THADDEUS SERE

PLAINTIFF-APPELLANT

v.

HEADQUARTERS, DEFENSE COMMUNICATIONS AGENCY, Component of Dept. of Defense

DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria, Albert V. Bryan, Jr., Chief District Judge. (C/A No. 86-556-A).

Submitted : August 23, 1988

Decided : September 23, 1988

Before RUSSELL, WIDENER, AND MURNAGHAN, Circuit Judges.

Joseph Thaddeus Sere, Appellant Pro Se.
Paula Pugh Newett, Office of the U.S. Attorney for Appellee.

PER CURIAM:

Joseph Thaddeus Sere appeals the district court's dismissal of his Title VII sex discrimination suit. The suit was dismissed under Fed.R.Civ. P.41(b) at the close of plaintiff's case. Based on our review of the trial transcript and exhibits, we conclude that the district court did not clearly err in finding that Sere was not denied promotions due to his sex. Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal arguments are adequately presented in the materials before the Court and oral argument would not significantly aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-1023

FILED
OCT.21 1988
U.S.Court of
Appeals
Fourth Circuit

Joseph Thaddeus Sere,
Plaintiff-Appellant,

v.

Headquarters,Defense
Communications Agency,

Defendant-Appellee.

On Petition for Rehearing

Upon consideration of appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan,with the concurrence of Judge Russell and Judge Widener.

For the Court

John M.Greacen
CLERK